Ohio Brass Company *and* Ricky Hillyer. Case 8-CA-1339-1

April 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge duly filed on November 6, 1979, by Ricky Hillyer, an Individual, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, on May 29, 1980, issued and served on the parties a complaint and notice of hearing. In substance, the complaint alleges that Ohio Brass Company, herein called Respondent, interrogated an employee in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, by inquiring about "the employee's protected concerted activities in processing industrial compensation claims." On June 2, 1980, Respondent filed an answer admitting in part, and denying in part, the allegations of complaint, and requesting that the complaint be dismissed.

Thereafter, on various dates in November 1980, the parties entered into a stipulation of facts in which they petitioned the Board to approve the transfer of this proceeding to the Board and waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision. The parties further stipulated that the entire record in this proceeding shall consist of the charge, the complaint and notice of hearing, the answer, and the stipulation of facts with accompanying exhibits. On December 11, 1980, the parties filed the stipulation of facts and a motion to transfer the proceeding with the Board. On February 20, 1981, the Board granted the motion, approved the stipulation, transferred the proceeding to the Board, and advised the parties that they could file briefs with the Board in Washington, D.C. Thereafter, the General Counsel and Respondent filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, the briefs, and the entire record in this proceeding, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with its principal office located in Mansfield, Ohio, and a facility located in Barberton, Ohio, is engaged in the manufacture of high voltage porcelain insulators. Annually, in the course and conduct of its business, Respondent ships finished products valued in excess of $50,000 to points directly outside the State of Ohio.

The parties stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts* [1]

Respondent's standard application for employment form, which has been in use continuously since June 1, 1979, and which must be, and has been, completed by all applicants for employment at Respondent's Barberton, Ohio, facility, asks, *inter alia*, whether the applicant has ever "filed an industrial claim." The application includes other questions about the applicant's health, safety background, and physical limitations, if any. Specifically, it questions whether the applicant has ever been hurt in an industrial accident, has ever had spinal injuries or complaint of bad back, or has any physical limitations. The application [2] also notes that all employment is dependent upon the applicant's satisfactorily passing a physical examination.

B. *Contentions of the Parties*

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by asking its applicants for employment, on Respondent's standard application form, whether they have filed prior industrial, i.e., workers' compensation, claims. The General Counsel argues that such an inquiry, unless justified by a legitimate and substantial business necessity, violates Section 8(a)(1) of the Act because it asks about an applicant's past involvement in protected concerted activity. In support of his position, the General Counsel relies, *inter alia*, on

[1] Respondent's brief to the Board set forth a number of alleged facts which were not included in the parties' original agreed-upon stipulation. On March 17, 1981, the General Counsel filed a motion to strike portions of Respondent's brief which contained alleged facts not included in the stipulation. We grant the General Counsel's motion and consider herein only those facts included in the parties' original stipulation of facts.

[2] The relevant portion of the application is attached to this Decision as an appendix [omitted from publication].

Boatel Alaska, Inc., 236 NLRB 1458 (1978), and *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979). Admitting that an employer has a legitimate and substantial business interest in the health and physical capabilities of his employees, as well as an interest in avoiding hiring employees who present a potential for industrial risk, the General Counsel nevertheless contends that the questions on Respondent's application which directly relate to an applicant's physical condition, coupled with the required physical examination, supply Respondent with the necessary information concerning such matters. Accordingly, there is no necessity to ask whether an applicant has filed an industrial claim. Respondent, on the other hand, contends that by asking applicants for employment whether they have filed an industrial claim it is seeking information that is relevant to the safe and efficient operation of its business. Respondent further contends that asking whether an applicant has ever filed an industrial claim does not interfere with employees' ability to engage in protected concerted activities. In support of its position, Respondent relies, *inter alia*, on *Buck Kreihs Company, Inc.*, 227 NLRB 352 (1976), and *Daniel Construction Company, a Division of Daniel International Corporation*, 240 NLRB 1254 (1979). Finally, Respondent contends that, even if the Board decides that Respondent's employment application form is unlawful, Respondent should not be found guilty of an unfair labor practice in this proceeding because it was allegedly acting in compliance with existing law when it formulated and used its employment application form. In essence, Respondent argues that any decision finding a violation here should be applied prospectively only.

C. *Discussion*

It is well settled that it is unlawful for an employer to inquire into employees' past exercise of protected concerted activity unless the employer has a substantial and legitimate business justification for doing so.[3] It is also well settled that applicants for employment enjoy the protection of Section 7 of the Act.[4] In *Krispy Kreme Doughnut, supra*, the Board found that the filing of a workers' compensation claim by an individual employee constituted protected concerted activity and that the discharge of an employee because of his expressed intent to file such a claim was unlawful. We now must determine whether it was unlawful for Respondent simply to inquire of an applicant on its employment application form whether the applicant had previously filed an industrial or workers' compensation claim. For the following reasons, we find no violation of the Act in such inquiry.

Unlike employer inquiries into an employee applicant's prior union experiences or affiliations, for which there is no legitimate business justification, Respondent, in the instant case, has a legitimate and substantial business justification for its inquiry, i.e., the health and safety of its work force. Its knowledge that an applicant has filed a prior industrial claim may alert Respondent to the fact that the employee applicant may once have been injured on the job, raising the possibilities of a continuing injury. At the least, the information may be of aid to the physician conducting the entry physical, and the information is relevant to the decision to hire an applicant.[5] Thus, Respondent is entitled to be aware of any possible physical limitations of prospective employees to determine whether it is advisable to hire them, and, if they are hired, to avoid placing them in situations potentially dangerous to themselves and their fellow workers. Inquiring into an applicant's past history of industrial claims does not, as the General Counsel would intimate, *per se*, interfere with the applicant's ability to engage in protected concerted activity. We see no "inherently coercive" effect on such protected activity where, as here, and unlike those cases where inquiry is made of an applicant's prior union activity, Respondent has a legitimate reason for such inquiry. Moreover, there is no evidence in the instant case that Respondent has ever refused to hire any applicant simply because of that applicant's prior filing of industrial or workers' compensation claims.

As noted, in *Krispy Kreme, supra*, the Board found that an employer had violated the Act when it *discharged* an employee solely because of his expressed intent to file a workmen's compensation claim. The Board found that the employee's "refusal to forebear from filing a claim opposes [the employer's] attempt to deny him and other employees access to workmen's compensation benefits," which were benefits that arose out of the employment relationship and which were of common interest to employees.[6]

Here we find no attempt by Respondent to "deny employees access to workmen's compensation benefits" by its *simple* inquiry into whether an applicant had ever filed for such benefits. We also note that the Administrative Law Judge in *Krispy Kreme* indicated that the discharge of the employee

[3] *Rochester Cadet Cleaners, Inc.*, 205 NLRB 773 (1973); *Boatel Alaska, supra.*

[4] *Lucy Ellen Candy Division of F & F Industries, Inc.*, 204 NLRB 121, 123 (1973).

[5] Cf. *Daniel Construction, supra*; *Buck Kreihs, supra.*

[6] 245 NLRB at 1053.

there "because he manifested an intention to file a workmen's compensation claim, if condoned, would recognize a right in employers to create a coercive aura with respect to this remedial procedure and thereby to dampen the salutary impact of workmen's compensation laws on job safety generally."[7] Such a "coercive aura" is not involved in a case, like the instant case, where the conduct complained of is the mere inquiry about the filing of a claim in the past, and where the General Counsel has shown no untoward motive on Respondent's part for such an inquiry.[8] In such circumstances, we find no violation in Respondent's asking such a question on its application form, since we deem it a pertinent question "bearing upon the applicant's history of personal injury,"[9] and one which we find Respondent was privileged to ask.[10]

[7] 245 NLRB at 1062.

[8] In *Krispy Kreme* the Board found the employee's activity protected because the matter of workers' compensation benefits arose out of the employment relationship and was of common interest to other employees. Accordingly, the discharge (for expressed intent to file a workers' compensation claim) denied access to compensation to an individual employee and, by example, to other employees. Here, we are faced with a situation where an inquiry is made into an applicant's prior filing of industrial claims. While applicants for employment are entitled to the protections of the Act and we have held that it is *per se* unlawful for an employer to inquire of an applicant's prior union activities, other inquiries may be lawful if supported by a substantial and legitimate business justification. Here, we have determined that Respondent has a substantial and legitimate business justification for its inquiry, i.e., the health and safety of its work force. Further, here, unlike *Krispy Kreme*, there is no showing that any applicant or employee has been directly or "by example" denied access to compensation by the employer's inquiry because no evidence has been presented to show that Respondent has ever refused to hire any applicant who had previously filed an industrial claim.

[9] *Daniel Construction, supra*, 240 NLRB at 1258.

[10] *Daniel Construction Company, supra; Buck Kreihs, supra*; cf. *Krispy Kreme, supra* at 1057–60.

Because we find that Respondent did not violate the Act by inquiring of applicants for employment if they had filed industrial claims, we find it unnecessary to reach Respondent's other contention that any decision finding a violation should be applied prospectively only.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER ZIMMERMAN, concurring:

I agree that Respondent's inquiry on a standard application form as to whether the job applicant had ever "filed an industrial claim"—the only issue in this case—is not a violation of the Act. Unlike my colleagues, however, I would find it unnecessary to examine Respondent's justification for the inquiry.

They assert that no employer inquiry concerning past exercise of protected activity is lawful unless the employer has a substantial and legitimate business justification for doing so. Requiring such justification is, of course, valid with respect to union activity, which is expressely protected by Section 7 of the Act. Filing workers' compensation claims, however, should be distinguished as an *implied* Section 7 right. Such claims do arise out of the employment relationship, and are presumed to be of common interest to other employees, absent evidence of disavowal of concern by employees.[11] The filing of such claims is thus protected by the Act only through a rebuttable presumption that the activity is concerted, and, unlike union activity, it is not covered *per se* by the Act. Accordingly, the mere inquiry into the filing of past claims cannot be found unlawful in the absence of evidence of unlawful motive. No such unlawful purpose is involved here, and I therefore join in dismissing the complaint.

[11] *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enforcement denied 635 F.2d 304 (4th Cir. 1980).